INDEX.

	Page
Opinions below	1
Grounds upon which jurisdiction of this Court is invoked	2
Statement of case	3
Specification of assigned errors	6
Summary of argument	7
Argument	8
Appendix	15

Cases Cited.

C. T. Investment Co. v. Commissioner (C. C. A. 8), 88 F. (2d) 582	12-13
D. W. Douglas, 37 B. T. A. 1122	13
Edison Securities Corporation, 34 B. T. A. 1188	13
Helvering v. Alabama Asphaltic Limestone Company, 315 U. S. 178, 86 L. ed. 775	2, 9
Helvering v. Cement Investors, Inc., 316 U. S. 527, 86 L. Ed. 1649	11
Helvering v. Southwest Consolidated Company, 315 U. S. 194, 86 L. ed. 789	2, 9
Hortense A. Menefee, 46 B. T. A. 865	13
Palm Springs Holding Corporation v. Commissioner of Internal Revenue, 315 U. S. 185, 86 L. ed. 780	2, 9
Seiberling Rubber Co. v. Commissioner (C. C. A. 6), 169 F. (2d) 595	11
Snowden v. McCabe (C. C. A. 6), 111 F. (2d) 743	11
Starr v. Commissioner (C. C. A. 4), 82 F. (2d) 964	13
United States of America v. United States Gypsum Co., 333 U. S. 364, 92 L. ed. 746	3, 9

Von's Investment Co. v. Commissioner (C. C. A. 9), 92 F. (2d) 861, 111 F. (2d) 440 13

W. N. Fry, 5 T. C. 1058 ..... 8, 9, 13
Walter S. Heller, 2 T. C. 371 10
William H. Redfield, 34 B. T. A. 967 13

Statutes Cited.

C. 646, 62 Stat. 928 (1948), 28 U. S. C., Section 1254 (1) 2
Internal Revenue Code:
Section 112 (g) (1) (D) and Section 112 (g) (2) [26 U. S. C. A., Section 112 (g) (1) (D) and Section 112 (g) (2)] 8
Section 113 (a) (7) (B) [26 U. S. C. A., Section 113 (a) (7) (B)] 8
Revenue Act of 1932:
Section 112 (i) (1) (B) and 112 (i) (2), c. 209, 47 Stat. 169 8
Revenue Act of 1936:
Section 112 (b) (3), (4) and (5) as modified by Section 112 (e) 10
Sections 112 (b) (3) and (5) as modified by Section 112 (e) 10
Section 112 (b) (4) as modified by Section 112 (e) .. 10, 11
Section 112 (b) (5), c. 699, 49 Stat. 1648 ..... 3, 6
Section 112 (b) (5), c. 699, 49 Stat. 1648 ..... 3, 11, 12
Revenue Act of 1939:
C. 59, 53 Stat. 574 11

Textbook Cited.

Mertens, Vol. 3, Sec. 20.59, p. 226 13

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1949.

No. .....

NATIONAL BANK OF COMMERCE IN MEMPHIS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF OF PETITIONER.

OPINIONS BELOW.

The judgment sought to be reversed by the Petitioner for writ of certiorari filed in this case was entered in the United States Court of Appeals for the Sixth Circuit on April 6, 1950, when the Court of Appeals, in a written opinion, denied the petition for rehearing of that Court's decision (R. p. 191). This opinion has not as yet been published in the advance sheets of the Federal Reporter, Second Series. The opinion of the United States District Court for the Western District of Tennessee, Western Division, the trial Court in this case, was entered on

January 10, 1949, and appears at 87 F. Supp. 302. The judgment of the District Court was affirmed per curiam by the Court of Appeals on February 15, 1950, and this opinion appears in the advance sheets of April 17, 1950, of 180 Federal Reporter, Second Series, 356. The opinion of the Court of Appeals denying the petition for rehearing referred to at the outset hereof will appear at ... F. (2d) ...

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED.

The statutory authority sustaining the jurisdiction of this Court is c. 646, 62 Stat. 928 (1948), 28 U. S. C. Section 1254 (1). The particular ground upon which the jurisdiction of this Court is invoked is that the District Court and the Court of Appeals have decided a Federal question, namely, the application of a Federal Revenue Law in conflict with the principles of law announced by the Supreme Court in **Helvering v. Alabama Asphaltic Limestone Company**, 315 U. S. 178, 86 L. ed. 775; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, 315 U. S. 185, 86 L. ed. 780; and **Helvering v. Southwest Consolidated Company**, 315 U. S. 194, 86 L. ed. 789.

The lower Courts have failed to apply the so-called non-taxable exchange provisions and the reorganization provisions of the appropriate Revenue Acts in accordance with the decisions of this Court in the cases hereinbefore cited. The pertinent sections of the statutes concerned are included herein as an appendix to this brief. Since the decisions of the lower Courts, therefore, are in conflict with the applicable decisions of this Court, it is appropriate for this Court to take jurisdiction of the case for the purpose of correcting the error complained of. In addition, the rule announced by this Court in the case

of **United States of America v. United States Gypsum Co.,** 333 U. S. 364, 92 L. ed. 746, to the effect that the Supreme Court may reverse a finding of fact by a trial Court in a case tried without a jury where the reviewing Court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed, supports the jurisdiction of this Court to reverse the decisions of the lower Courts.

STATEMENT OF CASE.

This case had its origin in a suit for refund of Federal income taxes alleged to have been erroneously and illegally assessed and collected from the Petitioner for the calendar year 1941 (R. pp. 1, 2, 3). The **gravamen** of the complaint was that Petitioner, in computing its allowable deduction for depreciation on its bank building and fixtures, had been denied the use of the adjusted cost basis of such assets as such adjusted cost basis existed with respect to Petitioner's predecessor and transferor, Bank of Commerce & Trust Company, from whom Petitioner had acquired the bank building and fixtures in connection with a reorganization and as a result of a non-taxable exchange (R. p. 7). It was contended that Petitioner was the end product of a statutory reorganization and that Petitioner was a party to the reorganization within the purview of the statute (R. pp. 6, 7). It was specifically urged that the Petitioner acquired its bank building and fixtures in connection with a statutory reorganization in which there was no recognized loss to its transferor, and as a result the basis for depreciation allowance was the adjusted cost basis of the transferor. It was also urged that Petitioner acquired such property in a non-taxable exchange as defined in Section 112 (b) (5) of the Revenue Act of 1936, c. 699, 49 Stat. 1648, as a result of which there was no recognized loss to the transferor and, therefore, the adjusted cost basis of the

transferor was the appropriate basis to be used by Petitioner in computing its allowable deductions for depreciation (R. pp. 7, 8).

The record establishes that Bank of Commerce & Trust Company (hereinafter referred to as Old Bank) was a State banking institution organized under the laws of the State of Tennessee with its banking house and place of business located at 45 South Second Street, Memphis, Tennessee (R. pp. 16, 17). In 1933 Old Bank was confronted with the imminent possibility of closing as a result of a run on the bank incident to the widespread and general depression. To insure payment to its depositors in full, the Old Bank borrowed $13,000,000.00 from the Reconstruction Finance Corporation and secured the loan by a pledge of the Bank's assets and an additional pledge of about $2,000,000.00 by individuals who were directors, stockholders or depositors of the Bank (R. p. 17). As a solution to the dilemma in which the Old Bank found itself, the persons in control of the Old Bank determined to organize a new national bank (R. pp. 17, 18). Such a bank was organized under the name of National Bank of Commerce in Memphis and is the Petitioner herein. The Petitioner will sometimes hereinafter be referred to as the New Bank. The New Bank was organized on May 1, 1933, and the Old Bank subscribed and paid for all the stock of the New Bank except the 140 qualifying shares required to be held by the directors of the New Bank. The Old Bank then owned 9,860 shares of the 10,000 shares of the total outstanding stock, or 98.6% of such stock (R. pp. 17, 18, 19). The New Bank forthwith took over substantially all the liquid assets and banking business of the Old Bank and the Old Bank discontinued its general banking business on May 1, 1933 (R. pp. 45, 46).

The New Bank immediately commenced to function as a national bank in the banking house at 45 South Second

Street, Memphis, Tennessee, and there was no interruption in the transacting of banking business in this location. The New Bank continued the banking business at the same location with substantially the same employees as had been employed by the Old Bank. A committee was appointed to liquidate the Old Bank and surrender its charter (R. p. 46).

Prior to January 5, 1937, record title to the realty, banking house, furnishings and fixtures then used by the New Bank was in the Old Bank (R. pp. 98, 99). On that date, after release by the Reconstruction Finance Corporation of its lien on the building and fixtures, title to the realty, banking house, furnishings and fixtures, was conveyed from the Old Bank to the New Bank. The transaction was reflected on the books of the Old Bank and the books of the New Bank as a transfer for a consideration of $950,000.00, which was immediately applied to reduce the indebtedness of the Old Bank to the Reconstruction Finance Corporation (R. pp. 99, 100). The adjusted basis of the property conveyed was $1,666,297.74 at the date of transfer. It was the purpose of the organization of the New Bank to continue the banking business at the location of the Old Bank (R. p. 46). It was contemplated from the outset of the reorganization proceeding that the bank building would be acquired by the New Bank and that it would not be transferred to anyone other than the New Bank (R. p. 49). The bank building was not for sale (R. p. 52). And its transfer from the Old Bank to the New Bank was part and parcel of the plan of reorganization adopted in 1933 (R. p. 53).

All of the stock of the New Bank was subsequently distributed to the stockholders of the old Bank, the first of such distributions being in 1939 and the second and last distribution being in 1946. The charter of the Old Bank was surrendered in 1947 (R. p. 100). All of the depositors of the Old Bank were paid in full (R. p. 70).

SPECIFICATION OF ASSIGNED ERRORS.

The Petitioner assigns as error:

1. That the Court of Appeals erred in affirming the determination of the trial Court that the Petitioner did not acquire its bank building and fixtures in connection with a statutory reorganization upon an exchange as to which there was no recognized loss to Petitioner's transferor.

2. That the Court of Appeals erred in sustaining the determination of the trial Court that Petitioner did not acquire its bank building and fixtures in a non-taxable exchange as defined by Section 112 (b) (5) of the Revenue Act of 1936, c. 699, 49 Stat. 1648, in which exchange there was no recognized loss to the transferor.

SUMMARY OF ARGUMENT.

Petitioner acquired its banking house, facilities and furnishings in an exchange in connection with a statutory reorganization or, in the alternative, such assets were acquired in a statutory non-taxable exchange and in either event Petitioner is entitled to use as its basis in computing its allowable deductions for depreciation the basis of such property as it existed with respect to its predecessor and transferor on the date of the exchange.

ARGUMENT.

Section 113 (a) (7) (B) of the Internal Revenue Code, [26 U. S. C. A., Section 113 (a) (7) (B)], provides in substance that if property is acquired by a corporation in connection with a reorganization, the basis of such property shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor. Petitioner has contended at all times that this Section of the statute applies. Accordingly, the first step logically in an inquiry into this position of Petitioner is the ascertaining of whether there was a statutory reorganization of Bank of Commerce & Trust Company into the Petitioner, National Bank of Commerce in Memphis. This inquiry may be disposed of summarily because the District Court in its opinion found that there was a reorganization of Bank of Commerce & Trust Company, referred to as Old Bank, into the Petitioner, referred to as New Bank, and that New Bank was a party thereto under the provisions of Section 112 (g) (1) (D) and Section 112 (g) (2) of the Internal Revenue Code [26 U. S. C. A., Section 112 (g) (1) (D) and Section 112 (g) (2)] (R. p. 93). [The Sections of the Code cited by the Trial Court are without material variation from Section 112 (i) (1) (B) and 112 (i) (2) of the Revenue Act of 1932, c. 209, 47 Stat. 169, the revenue statute in effect at the inception of the reorganization in 1933.] This determination of the lower Court was affirmed by the Court of Appeals (R. pp. 109, 191). In addition, the Tax Court of the United States in the case of **W. N. Fry**, 5 T. C. 1058, in which the fact of reorganization of Old Bank into New Bank was material to the determination of the issue presented in the case, held that there was a statutory reorganization.

The next step in an inquiry into Petitioner's basic contention is whether Petitioner acquired its bank building and fixtures in connection with a statutory reorganization judicially determined as hereinabove pointed out. And it is on this fundamental point that the lower Courts by failing to apply correctly the principles of **Helvering v. Alabama Asphaltic Limestone Company**, 315 U. S. 178, 86 L. ed. 775; **Palm Springs Holding Corporation v. Commissioner of Internal Revenue**, 315 U. S. 185, 86 L. ed. 780; and **Helvering v. Southwest Consolidated Company**, 315 U. S. 194, 86 L. ed. 789, erred in holding that Petitioner's acquisition of its bank building and fixtures from Old Bank was a transaction outside the scope of the reorganization and was not an exchange in connection with a reorganization. The lower Courts have disregarded the uncontroverted evidence of Petitioner that the transfer of the bank building from the Old Bank was part and parcel of the plan of reorganization adopted in 1933 and that it was contemplated from the very outset of the plan that the building would be acquired by the New Bank and no one else. It was never contemplated that the building would be transferred to anyone other than the New Bank. This evidence appears at pages 49, 50, 51 and 53 of the record. This uncontroverted evidence of Petitioner is in complete harmony with the import of the entire evidence offered in the proceeding. This being so, it is appropriate for the erroneous finding of the District Court to be reviewed by this Court. **United States of America v. United States Gypsum Co.**, 333 U. S. 364, 92 L. ed. 746.

The trial Court found that the plan of reorganization which was initiated in 1933 was consummated in 1947 (R. pp. 90, 91). And the Tax Court in **W. N. Fry**, supra, determined that at the time of the hearing of that case in 1945 the reorganization proceeding was still continuing. Notwithstanding, the District Court determined that Petitioner's acquisition of its bank building was a separate

and distinct transaction, something apart from the reorganization. This is an unrealistic conclusion and ignores the substance of the transaction to exalt the form. It is as artificial to say that the New Bank "purchased" and that the Old Bank "sold" as it would be to urge that an individual had made a sale when he transferred his pocket knife from his right hand pocket to his left hand pocket and at the same time transferred money from his left hand pocket to his right hand pocket. The article transferred, be it the bank building or the pocket knife, has neither gained nor lost in value by reason of the transfer. It is proper in determining the substance of a transaction to consider the situation as it existed at the beginning and at the end of a series of steps as well as the object sought to be accomplished, the means employed and the relations between the various steps. **Walter S. Heller**, 2 T. C. 371.

There was no break in the continuity of the banking business from the time the Old Bank was threatened with catastrophe through the time of the organizing of the New Bank and to the present time. The banking business was carried on in the same location with substantially the same employees (R. p. 46).

If Petitioner acquired its bank building in connection with a reorganization, as it contends herein, the next step is determining whether the acquisition falls within the non-taxable exchange provisions of Section 112 (b) (3), (4) and (5) of the Revenue Act of 1936, as modified by Section 112 (e), as consistently urged by the Petitioner. The trial Court indicated that it thought Section 112 (b) (4) as modified by Section 112 (e) would apply if the exchange had been in connection with a reorganization (R. p. 93). The trial Court also indicated that Sections 112 (b) (3) and (5) as modified by Section 112 (e) might be applicable under the same circumstances (R. p. 93).

It would serve no useful purpose to enter upon a discussion of the statutory provisions. It is obvious that the transaction falls squarely within the provisions of Section 112 (b) (4) as modified by Section 112 (e). The acquisition of the bank building by Petitioner falls squarely within the protective cloak envisaged by the Congress in enacting the reorganization and non-taxable exchange provisions as stated by the Court in **Seiberling Rubber Co. v. Commissioner** (C. C. A.-6), 169 F. (2d) 595. To the same effect is **Snowden v. McCabe** (C. C. A.-6), 111 F. (2d) 743. See also Regulation 112, Section 29.112 (g)-1 and 2.

The argument hereinbefore made is equally applicable to the effect of Section 112 (b) (5) of the Revenue Act of 1936, although this Section deals with exchanges not made in connection with a reorganization, because the reorganization provisions and the non-taxable exchange provisions to a degree overlap. **Helvering v. Cement Investors, Inc.**, 316 U. S. 527, 86 L. Ed. 1649, and **Seiberling Rubber Co. v. Commissioner**, supra.

The lower Courts failed to appreciate the applicability of Section 112 (b) (5) of the Revenue Act of 1936 and the effect of the amendments made to Section 112 of the Internal Revenue Code by the Revenue Act of 1939, c. 59, 53 Stat. 574, whereby Subsection (k) dealing with the assumption of liability was added to the Internal Revenue Code. The Revenue Act of 1939 also by Subsection (f) thereof provided that such an assumption of liability should not be recognized under prior Revenue Acts. Thus, within the meaning of such Section as affected by the cited amendments the Old Bank transferred property, buildings and fixtures, to the New Bank solely in exchange for stock or securities (the assumption and payment of a liability of the Old Bank to the Reconstruction Finance Corporation) in the New Bank and immediately

after the exchange the Old Bank was in control of the New Bank. The discharge of the liability is treated as stock or securities and falls squarely within the meaning of Section 112 (b) (5). Thus, the consideration for the transfer of the building was first, the issuance of stock in the New Bank, and second, the assumption and discharge of a liability which is treated as stock or securities under Section 112 (b) (5), as amended.

Adverting again to the reorganization it should be realized that had there been no reorganization the Old Bank and its stockholders would have been entitled to the same deductions for depreciation which the Petitioner maintains it is entitled to in this proceeding. Merely because of the change in form of ownership of the banking business and its assets the Government contends that the same business owned by the same stockholders must take a lower depreciation deduction than they would have been entitled to had the reorganization not taken place. Obviously, this is a result not contemplated by the statute under any of its provisions.

Within the sphere of the reorganization was contained the banking business and assets. While there were nominally two corporations there was only one business in process of reorganization and there was only one set of stockholders. It cannot be said that any transactions between two parts of the business itself can produce a loss or change the basis of the property involved. It was a purpose of the reorganization provisions to disregard such transactions in determining recognized losses.

It is apparent that a plan of reorganization extending over a period of time as prolonged as that here existing must have an inherent flexibility to permit the meeting of problems as they arose. A plan of reorganization may be amended as circumstances indicate. **C. T. Investment Co.**

v. Commissioner (C. C. A.-8), 88 F. (2d) 582. This fundamental condition was not recognized by the lower Courts.

The Courts' conception of what was done is of separate and unrelated acts, and they fortify this conception by a disregard for the testimony of the witnesses that in truth all of the acts were related as parts of a single plan, that the consummation of all was contemplated when the first was commenced. The evidence is undisputed that from the beginning a reorganization was contemplated which would continue the business and operations of the Old Bank and that the operations should thenceforth be conducted in the same building by the new national bank; the Old Bank should become inactive and should ultimately be dissolved. There was no thought of giving the shareholders a distribution of assets either in a dividend or in liquidation. Their part was merely to continue as the same shareholders of a newly arranged business. The entire plan was integrated and what was done was a series of steps in it to achieve the reorganization. It is not important whether the plan was written, so long as the evidence is clear that it existed, **Edison Securities Corporation**, 34 B. T. A. 1188; **William H. Redfield**, 34 B. T. A. 967, and it is not important that its fulfillment was spread over several years instead of being accomplished simultaneously, so long as the steps were a consistent performance of the reorganization plan and purpose. **Von's Investment Co. v. Commissioner** (C. C. A.-9), 92 F. (2d) 861, 111 F. (2d) 440; **Starr v. Commissioner** (C. C. A.-4), 82 F. (2d) 964; **D. W. Douglas**, 37 B. T. A. 1122; **W. N. Fry**, supra; **Hortense A. Menefee**, 46 B. T. A. 865. See Mertens, Vol. 3, Sec. 20.59, p. 226.

Wherefore, your Petitioner respectfully prays that the petition for writ of certiorari be granted and that this Court's writ of certiorari issue to the United States Court of Appeals for the purpose of reviewing the questions

hereinbefore specified and that upon review the judgment and decision of the Court of Appeals be reversed and that your Petitioner have such other and further relief as this Court may deem appropriate.

Respectfully submitted,

W. G. BOONE,

JOHN R. STIVERS,

CANALE, GLANKLER, LITTLE,
BOONE & LOCH,
Attorneys for Petitioner.

APPENDIX.

Internal Revenue Code:

Section 113. Adjusted Basis for Determining Gain or Loss—

(a) Basis (Unadjusted) of Property. The basis of property shall be the cost of such property; except that—

* * * * * * *

(7) Transfers to Corporation. If the property was acquired—

(A) after December 31, 1917, and in a taxable year beginning before January 1, 1936, by a corporation in connection with a reorganization, and immediately after the transfer an interest or control in such property of 50 per centum or more remained in the same persons or any of them, or

(B) in a taxable year beginning after December 31, 1935, by a corporation in connection with a reorganization,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

(8) Property Acquired by Issuance of Stock or as Paid-in Surplus. If the property was acquired after December 31, 1920, by a corporation—

(A) by the issuance of its stock or securities in connection with a transaction described in section 112 (b) (5) (including, also, cases where part of the consideration for the transfer of such property to the corporation was property or money, in addition to such stock or securities), or

(B) as paid-in surplus or as a contribution to capital,

then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 112. Recognition of Gain or Loss.

(i) Definition of Reorganization. As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

(2) The term "a party to a reorganization" includes a corporation resulting from a reorganization

and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

Revenue Act of 1936, c. 699, 49 Stat. 1648:

Section 112. Recognition of Gain or Loss.

(a) General Rule. Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) Exchanges Solely in Kind.

* * * * * * *

(3) Stock for Stock on Reorganization. No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(4) Same—Gain of Corporation. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * * * *

(5) Amendment by Revenue Act 1939. No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to

his interest in the property prior to the exchange. Where the transferee assumes a liability of a transferor, or where the property of a transferor is transferred subject to a liability, then for the purpose only of determining whether the amount of stock or securities received by each of the transferors is in the proportion required by this paragraph, the amount of such liability (if under section 213 of the Revenue Act of 1939 it is not considered as "other property or money") shall be considered as stock or securities received by such transferor. If, as the result of a determination of the tax liability of the taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of the enactment of the Revenue Act of 1939, or by a closing agreement, the treatment of the amount of such liability was different from the treatment which would result from the application of the preceding sentence, such sentence shall not apply and the result of such determination shall be deemed proper. As amended June 29, 1939, c. 247, section 213 (h), 53 Stat. 872.

* * * * * * *

(e) Loss from exchanges not solely in kind. If an exchange would be within the provisions of subsection (b) (1) to (5), inclusive, of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

Revenue Act of 1939, c. 59, 53 Stat. 574:

Sec. 213. Assumption of Indebtedness.

(a) Assumption of Liability Not Recognized.—Section 112 of the Internal Revenue Code (relating to recognition

of gain or loss) is amended by adding at the end thereof the following new subsection:

"(k) Assumption of Liability Not Recognized.—Where upon an exchange the taxpayer receives as part of the consideration property which would be permitted by subsection (b) (4) or (5) of this section to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumes a liability of the taxpayer or acquires from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as 'other property or money' received by the taxpayer within the meaning of subsection (c), (d), or (e) of this section and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5); except that if, taking into consideration the nature of the liability and the circumstances in the light of which the arrangement for the assumption or acquisition was made, it appears that the principal purpose of the taxpayer with respect to the assumption or acquisition was a purpose to avoid Federal income tax on the exchange, or, if not such purpose, was not a bona fide business purpose, such assumption or acquisition (in the amount of the liability) shall, for the purposes of this section, be considered as money received by the taxpayer upon the exchange. In any suit or proceeding where the burden is on the taxpayer to prove that such assumption or acquisition is not to be considered as money received by the taxpayer, such burden shall not be considered as sustained unless the taxpayer sustains such burden by the clear preponderance of the evidence."

* * * * * * *

(f) Assumption of Liability Not Recognized Under Prior Acts.—

(1) Where upon an exchange occurring in a taxable year ending after December 31, 1923, and beginning before January 1, 1939, the taxpayer received as

part of the consideration property which would be permitted by subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, to be received without the recognition of gain if it were the sole consideration, and as part of the consideration another party to the exchange assumed a liability of the taxpayer or acquired from the taxpayer property subject to a liability, such assumption or acquisition shall not be considered as "other property or money" received by the taxpayer within the meaning of subsection (c), (d), or (e) of Section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, and shall not prevent the exchange from being within the provisions of subsection (b) (4) or (5) of section 112 of the Revenue Act of 1938, or the corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts; except that if, in the determination of the tax liability of such taxpayer for the taxable year in which the exchange occurred, by a decision of the Board of Tax Appeals or of a court which became final before the ninetieth day after the date of enactment of the Revenue Act of 1939, or by a closing agreement, gain was recognized to such taxpayer by reason of such assumption or acquisition of property, then for the purposes of section 112 of the Revenue Act of 1938, and corresponding provisions of the Revenue Act of 1924 or subsequent revenue Acts, such assumption or acquisition (in the amount of the liability considered in computing the gain) shall be considered as money received by the taxpayer upon the exchange.

(2) Paragraph (1) shall be effective with respect to the Revenue Act of 1924 and subsequent revenue Acts as to the date of enactment of each such Act.

Regulations 112:

Sec. 29.112 (g)-1. Purpose and Scope of Exception of Reorganization Exchanges.

Purpose: Under the general rule, upon the exchange of property, gain or loss must be accounted for if the new property differs in a material particular, either in kind or in extent, from the old property. The purpose of the reorganization provisions of the Internal Revenue Code is to except from the general rule certain specifically described exchanges incident to such readjustments of corporate structures, made in one of the particular ways specified in the Code, as are required by business exigencies, and which effect only a readjustment of continuing interests in property under modified corporate forms * * *. In order to exclude transactions not intended to be included, the specifications of the reorganization provisions of the law are precise. Both the terms of the specifications and their underlying assumptions and purposes must be satisfied in order to entitle the taxpayer to the benefit of the exception from the general rule. Accordingly, under the Code, a short-term purchase money note is not a security of a party to a reorganization, an ordinary dividend, and a sale is nevertheless to be treated as a sale, even though the mechanics of a reorganization have been set up.

Scope: The non-recognition of gain or loss is prescribed for two specifically described types of exchanges, viz.: The exchange that is provided for in section 112 (b) (3) in which stock or securities in a corporation a party to the reorganization are, in pursuance of a plan of reorganization, exchanged for the stock or securities in a corporation a party to the same reorganization; and the exchange that is provided for in section 112 (b) (4) in which a corporation a party

to the reorganization exchanges property, in pursuance of a plan of reorganization, for stock or securities in another corporation a party to the same reorganization. Section 112 (g) limits the definition of the term "reorganization" to six kinds of transactions and excludes all others. From its context, the term "a party to a reorganization" can only mean a party to a transaction specifically defined as a reorganization by section 112 (g).

The provisions of the Internal Revenue Code referred to in the preceding paragraph of this section are inapplicable unless there is a plan of reorganization. A plan of reorganization must contemplate the bona fide execution of one of the transactions specifically described as a reorganization in section 112 (g) and for the bona fide consummation of each of the requisite acts under which non-recognition of gain is claimed. * * *

Sec. 29.112 (g)-2. Definition of Terms.

The application of the term "reorganization" is to be strictly limited to the specific transaction set forth in section 112 (g) (1). The term does not embrace the mere purchase by one corporation of the properties of another corporation, for it imports a continuity of interest on the part of the transferor or its stockholders in the properties transferred. If the properties are transferred for cash and deferred payment obligations of the transferee evidenced by short-term notes, the transaction is a sale and not an exchange.

The term "plan of reorganization" has reference to a consummated transaction specifically defined as a reorganization under section 112 (g) (1). The term is not to be construed as broadening the definition of "reorganization" as set forth in section 112 (g) (1),

but is to be taken as limiting the non-recognition of gain or loss to such exchanges as are directly a part of the transaction specifically described as a reorganization in section 112 (g) (1). Moreover, the transaction, or series of transactions, embraced in a plan of reorganization must not only come within the specific language of section 112 (g) (1), but the readjustments involved in the exchanges effected in the consummation thereof must be undertaken for reasons germane to the continuance of the business of a corporation a party to the organization. Section 112 (g) (1) contemplates genuine corporate reorganizations which are designed to effect a readjustment of continuing interests under modified corporate forms.